No. 2526

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United States

Circuit Court of Appeals

For the Ninth Circuit.

HAMILTON TRUST COMPANY,
Complainant and Appellant,

and

CORNUCOPIA MINES COMPANY OF OREGON, et al.,
Respondents and Appellants,

vs.

JOHN L. BISHER, JR., by John L. Bisher, his guardian *ad litem*,
Intervener and Appellee.

Reply Brief of Appellants

WALLACE McCAMANT,
EMMETT CALLAHAN,
WOOD, MONTAGUE & HUNT,
Solicitors for Appellants.

Upon Appeal from the District Court of the United States for the District of Oregon.

APPELLANTS' REPLY BRIEF.

Appellants regard the concluding portion of Appellee's Brief, found on pages 57 to 78, so misleading that we think it necessary to make some reply thereto in order to put the Court right as to the condition of the record.

We find on page 57 of Appellee's Brief the following language:

> "It appears from the record that the Receiver acquired the lands from McDonald and constructed a power plant on such lands, and acquired a water right from the State of Oregon, and that neither the lands nor the water right so acquired are mentioned or described in the trust deed or mortgage executed to the Hamilton Trust Company."

From page 57 to page 64 solicitors for Appellee advance their contentions that the Receiver made betterments on the property amounting in the aggregate to a large sum of money, and then follows this sentence on page 64:

> "None of said property is mentioned or described in the deed which was executed by the Special Master to C. E. S. Wood as Trustee for the bondholders."

The fact is that the report of the Special Master Commissioner who sold the property to C. E. S. Wood on the 29th of July, 1912, reported a sale not

only of the property specifically described in the bill of complaint on pages 11 to 20 of the record, inclusive, but this report also contained the language with reference to appurtenant and after acquired property found on pages 20 and 21 of the record, as follows:

> "TOGETHER with all the machinery for the reduction of ore, mining machinery, mining tools and equipment, ore of all kinds and personal property located at Cornucopia or Baker City, Oregon, or on the property known as the Cornucopia Mines of Oregon, or elsewhere now held or acquired or hereafter held or acquired for use in connection with the said Cornucopia mines, or the business thereof; **and also all the easements, property,** leasehold rights **and things of whatsoever name or nature now or hereafter connected with or relating to the said Cornucopia Mines, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining** and the reversion and reversions, remainder and remainders, and also all the estate, right, title and interest, property, possession, claims and demand whatsoever as well at law as in equity of the Cornucopia Mines of, in and to the same and any and every part thereof, with the appurtenances. The personal property and chattels above conveyed and transferred or intended so to be, now held or hereafter acquired, shall be deemed real estate for all the purposes of this indenture and shall be held and taken to be fixtures and appurtenances of the said Cornucopia Mines and part thereof and are to be

used, and in case of a sale hereunder, are to be sold therewith."

The foregoing description was followed in the deed executed by the Special Master Commissioner to C. E. S. Wood, the purchaser, and in the deed from C. E. S. Wood to Cornucopia Mines Company of New York, the present owner of the property.

The properties referred to in the portions of Appellee's Brief to which we are replying, are a power site purchased during the receivership for the sum of $250.00, on which after the property had been sold at foreclosure sale a power plant was erected, and a cyanide plant erected on property specifically covered by the mortgage and specifically described in the advertisement and report of sale and the deed executed by the Master Commissioner (Bisher 227). With the exception of the $250.00 paid Alexander McDonald for the purchase of the site and power plant no receivership money went into these improvements. The cyanide plant was used in connection with the operation of the mine, as was the power plant. They were plainly appurtenant to the mineral property and they plainly fall within the description of appurtenant and after acquired property above quoted, which description we repeat was included, and properly included, in the deed from the Master Commissioner to Wood and from Wood to Cornucopia Mines Company of New York. That equity will recognize and enforce a mortgage of after acquired property, especially where it is appurte-

nant to property specifically described in the mortgage is well settled.

Bear Lake Company v. Garland,
164 U. S. 1, 15.

The books are full of cases where valuable assets have passed by foreclosure under language akin to that quoted above and found in the mortgage and deeds making up the chain of title of the present owner of the property. See for example,

Parker v. New Orleans Company,
33 Fed. 693.

In Re Medina Quarry Company,
179 Fed. 929, 935-936.

Hickson Company v. Gay Company,
150 N. C. 316;
63 S. E. 1045.

Brady v. Johnson,
75 Md. 445;
26 Atl. 49, 52.

The deeds executed by McDonald ran to Cornucopia Mines Company of Oregon and not to the Receiver.

There is also referred to in the portion of Appellee's Brief to which we are replying a so-called water right. The fact is that the water right referred to by solicitors for Appellee had been appurtenant to this mineral property for a long period of years and had been owned by the respective owners of the property. The supply of water was adequate

and no additional water was applied for or desired by the Receiver. The Receiver did desire to carry the water a mile further down the hill in order to secure a greater head and command more power (Bisher 204). For this purpose and with a view to complying with the new water code of the State of Oregon, an application was made by the Receiver for permission to divert the water at this lower point. This permission was granted by the State Engineer and pursuant to authority contained in the foreclosure decree the Receiver transferred this permit to Cornucopia Mines Company of New York. Except the properties above referred to the Receiver has not had at any time, nor has he now, in his possession, or under his control, any property whatever (Betts 232):

A. No, sir.

Q. Mr. Betts, I want to ask you another question. Have you any other property in your possession, or has any other property come into your possession, aside from what has been transferred by these deeds in question, first, by the deed under the foreclosure sale, and the deed you have given as Receiver to the New York Company?

A. No, sir. No, nothing. You mean real estate? Have I bought any property?

Q. Well, has any property come into your hands as Receiver?

A. No.

Q. That has not been disposed of?

It clearly appears that the improvements which the Receiver placed upon the property were paid for by moneys secured by him without encroaching on the receivership funds (Betts 230-231):

Questions by Mr. Callahan.

Q. Now, just one more question, Mr. Betts, to make it clear to the Court. You have testified here in relation to certain permanent improvements that were made at various times, which were contemplated before the receivership, some carried on during the receivership and some portions carried on after the receivership?

A. Yes.

Q. Now, tell the Court where you got the money to make those expenditures, and to pay for those improvements, and the machinery specifically.

A. It was sent me from Mr. Lawrence's office, and aggregated up till about the first of September some $83,000.

COURT: What year?

A. 1912.

COURT: That was sent to you prior to the receivership and during the receivership?

A. Yes, sir; prior to the receivership and during the receivership, and was deposited in my name as leesee, in Spokane, Washington, in the Spokane Bank.

Q. Where were you in the habit of carrying your account under the receivership and as leesee of the mine?

A. In the Citizens Bank of Baker, Oregon. I did my best, your Honor, to keep things separate and straight.

Betts 214-215.

Q. Mr. Betts, while you were in charge of this property as Receiver, what improvements, if any, did you make on that property?

A. Very few as Receiver.

Q. Well, did you make any at all?

A. Not that I remember of now, no sir.

Q. Didn't you construct a cyanide plant on it?

A. Not as Receiver, no sir.

Q. Didn't you do it otherwise?

A. I put in other money, yes sir.

Q. How much did that cyanide plant cost?

A. About $70,000 or $80,000.

Q. And what other betterments and improvements did you put on this property during the time that you were Receiver?

A. Merely the power-house.

Q. And what other improvements?

A. None that I remember now as being of any magnitude.

The fact is that the funds provided by Benjamin B. Lawrence and his associates paid the Receiver's salary of $350.00 a month (Bisher 223), paid $600.00 advanced by the Receiver to take care of the hospital expense of John L. Bisher, Jr. (Betts 220), and probably paid other expenses as well.

The testimony from which we have quoted above is wholly uncontradicted. The statement found on page 77 of Appellee's Brief to the effect that $12,-714.26 from the receivership funds went into the improvements and betterments above referred to is wholly without support in the record and is contradicted by the only testimony which bears upon the subject. If the argument of solicitors for Appellee be correct in contending that they are entitled to levy on the properties acquired by the Receiver and paid for with receivership funds, the application of the argument is limited to the amount of $250.00 paid Alexander McDonald for the five-acre strip of land. We do not overlook the fact that $300.00 of additional receivership money was paid to McDonald by way of damages done to his property. This was an operation expense and not a betterment.

Respectfully submitted,

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WOOD, MONTAGUE & HUNT,
WALLACE McCAMANT,
Solicitors for Appellants.